ASSISTANT COLLECTOR OF LAND REVENUES & ORS v. ALFEUS YAHSU & ANOR AND ANOTHER APPEAL

COURT OF APPEAL, KOTA KINABALU
MOHD ZAWAWI SALLEH JCA
PRASAD SANDOSHAM ABRAHAM JCA
ZALEHA YUSOF JCA
[CIVIL APPEALS NO: S-01(W)-49-02-2015 & S-02(W)-255-02-2015]
27 MAY 2016

JURISDICTION: *High Court – High Court in Sabah – Customary land – Claim for native customary rights – Whether High Court has original jurisdiction to hear claims for native customary rights – Whether High Court can only exercise appellate jurisdiction*

The land in dispute was part of a piece of land alienated to one Sudi Kembang ('the plaintiff'), in which the plaintiff was the registered owner. The plaintiff commenced an action in the High Court against the first and second defendants ('the respondents') for, amongst others, an injunction to stop the respondents from trespassing onto the disputed land. The respondents in defence contended that their case fell under common law as their forefathers had acquired native customary rights ('NCR') to the disputed land even before the arrival of the British Chartered Company in North Borneo and before the enactment of any written law on land ownership and alienation of such land as the Land Ordinance 1930 for generations. The respondents claimed that their forefathers had lawfully occupied the land and thus the disputed land could not be considered as State land defined under s. 4 of the Sabah Land Ordinance. The respondents also filed third party proceedings against, *inter alia*, the Assistant Collector of Land Revenue ('ACLR'), Registrar of Titles, The Director of Lands and Survey Department Sabah ('director') and the State Government of Sabah seeking declarations against the third parties on grounds, *inter alia*, that the impugned alienation was contrary to the procedure of the Land Ordinance for non-compliance of s. 13 of the Sabah Land Ordinance and was invalid on the ground that the mandatory notice of the plaintiff's land application to natives claiming native customary rights pursuant to s. 13 was not issued or published by the ACLR. The High Court moved to exercise its powers in granting declaratory relief to the respondents and held that for any claims relating to native customary rights occurring before 1930, the natives would be entitled to pursue a claim in common law. Hence, the present appeal. The issue that arose for consideration was whether the High Court Judge was right in law in assuming original jurisdiction over the matter when the relevant statutes clearly provided that the High Court's jurisdiction was merely of an appellate nature.

Held (allowing appeal; setting aside order of High Court)
Per Prasad Sandosham Abraham JCA delivering the judgment of the court:

(1) Where statute provides a specific regime of remedies that places the High Court with an appellate jurisdiction, then in those circumstances, the High Court cannot be seized with jurisdiction to hear the present matter as it did. In this particular case, the court was concerned not with the question of when these rights materialised but the manner these rights are to be recognised in law. Further, the Sabah Land Ordinance and its precursors do not make any distinctions between claims arising before 1930 or otherwise. The relevant statutes just provide a regime of procedures which a claimant must take to establish its customary rights, the apex of which lies with the High Court sitting as an appellate court. Therefore, the present court is unable to agree with the view of the High Court Judge in making a distinction between a cut-off date of claims before 1930 and otherwise. These rights from whatever date they accrue must be dealt with by the existing Land Ordinance as the consequence of a successful claim for native customary rights would result in a native customary title being issued by the third party or pursuant to s. 16 of Sabah Land Ordinance the claim to native customary rights could be dealt with monetarily. (paras 15 & 17)

(2) The High Court Judge in granting the declaratory orders sought by the respondents acted without jurisdiction as the High Court was again seized with appellate powers only. In the circumstances, the order granted by the High Court should be set aside and the ACLR be ordered to conduct a public inquiry within 60 days from the date of the present order, relating to the respondents' NCR claims pursuant to ss. 13, 14, 15 and 16 of Sabah Land Ordinance. (paras 20 & 25)

Bahasa Malaysia *Headnotes*

Tanah yang menjadi pertikaian adalah sebahagian daripada sebidang tanah yang diberi milik kepada satu Sudi Kembang ('plaintif'), di mana plaintif adalah pemilik berdaftar. Plaintif memulakan suatu tindakan di Mahkamah Tinggi terhadap defendan pertama dan kedua ('responden-responden') untuk, antara lain, perintah injunksi bagi menghalang responden-responden daripada menceroboh tanah yang menjadi pertikaian itu. Responden-responden dalam pembelaannya menghujahkan bahawa kes mereka terjumlah di bawah common law sepertimana nenek moyang mereka memperoleh hak adat orang asli ('NCR') bagi tanah yang dipertikaikan walaupun sebelum ketibaan British Chartered Company di Borneo Utara dan sebelum enakmen undang-undang bertulis berkenaan milikan dan beri milik tanah tersebut sebagaimana dalam Ordinan tanah 1930 untuk beberapa generasi. Responden-responden mendakwa bahawa nenek moyang mereka telah menduduki tanah secara sah dan dengan itu tanah yang dipertikaikan itu tidak boleh dianggap sebagai

tanah Kerajaan yang ditakrifkan di bawah s. 4 Ordinan Tanah Sabah. Responden-responden turut memfailkan prosiding pihak ketiga terhadap, antara lain, Penolong Pemungut Hasil Tanah ('PPHT'), Pendaftar Hak Milik, Pengarah Jabatan Tanah dan Ukur Sabah ('Pengarah') dan Kerajaan Negeri Sabah menuntut deklarasi terhadap pihak ketiga atas alasan, antara lain, bahawa beri milik yang dipertikaikan bertentangan dengan prosedur Ordinan Tanah kerana ketidakpatuhan s. 13 Ordinan Tanah Sabah dan tidak sah atas alasan bahawa notis mandatori permohonan tanah plaintif kepada orang asli menuntut hak adat orang asli menurut s. 13 tidak dikeluarkan atau disiarkan oleh PPHT. Mahkamah Tinggi kemudian melaksanakan kuasanya dalam memberi relif pengisytiharan kepada responden-responden dan memutuskan bahawa bagi apa-apa tuntutan berkaitan dengan hak adat orang asli berlaku sebelum 1930, orang asli akan berhak untuk memulakan tuntutan dalam common law. Oleh itu, rayuan ini. Isu yang berbangkit untuk dipertimbangkan adalah sama ada Hakim Mahkamah Tinggi adalah betul mengikut undang-undang dalam mengandaikan bidang kuasa asal berhubung perkara itu apabila statut relevan menyatakan bahawa bidang kuasa Mahkamah Tinggi bersifat rayuan semata-mata.

Diputuskan (membenarkan rayuan; mengetepikan perintah Mahkamah Tinggi)

Oleh Prasad Sandosham Abraham HMR menyampaikan penghakiman mahkamah:

(1) Di mana statut menyediakan remedi tertentu yang melengkapkan Mahkamah Tinggi dengan bidang kuasa rayuan, maka dalam hal keadaan tersebut, Mahkamah Tinggi tidak boleh dianggap mempunyai bidang kuasa mendengar kes ini seperti sediakala. Dalam kes ini, mahkamah merangkumi bukan setakat persoalan bila hak-hak ini terjadi tetapi cara hak-hak ini akan diiktiraf dalam undang-undang. Selanjutnya, Ordinan Tanah Sabah dan pelopornya tidak membezakan antara tuntutan yang berbangkit sebelum 1930 atau sebaliknya. Statut relevan hanya memperuntukkan prosedur di mana pihak yang menuntut mesti ambil bagi mewujudkan hak adat, yang puncaknya Mahkamah Tinggi bersidang sebagai mahkamah rayuan. Oleh itu, mahkamah ini tidak bersetuju dengan pandangan Hakim Mahkamah Tinggi dalam membuat perbezaan antara tarikh akhir tuntutan sebelum 1930 dan sebaliknya. Hak-hak ini dari bila sahaja tarikh mereka terakru perlu berurusan dengan Ordinan Tanah sedia ada sebagai akibat daripada tuntutan yang berjaya bagi hak adat orang asli akan menyebabkan adat hak milik orang asli yang dikeluarkan oleh pihak ketiga atau menurut s. 16 Ordinan Tanah Sabah tuntutan kepada hak-hak adat boleh diurus secara kewangan.

(2) Hakim Mahkamah Tinggi dalam memberikan perintah deklarasi yang dituntut oleh responden-responden bertindak tanpa bidang kuasa kerana Mahkamah Tinggi sekali lagi merangkumi kuasa rayuan sahaja. Dalam hal keadaan ini, perintah yang diberikan oleh Mahkamah Tinggi perlu diketepikan dan PPHT diperintahkan untuk menjalankan siasatan awam dalam tempoh 60 hari dari tarikh perintah berkenaan dengan tuntutan NCR responden-responden menurut ss. 13, 14, 15 dan 16 Ordinan Tanah Sabah.

Case(s) referred to:

Borneo Samudera Sdn Bhd v. Uttoh Ajak & Ors; The Assistant Collector Of Land Revenue, Kinabatangan & Ors (Third Parties) [2014] 1 LNS 635 HC ***(refd)***

Darinsok Pangiran Apan & Ors v. Hap Seng Consolidated Bhd & Ors [2011] 6 CLJ 733 CA ***(refd)***

Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal [2006] 1 CLJ 577 FC ***(refd)***

Ensui Gudul v. Suin & Ors [2010] 1 LNS 943 HC ***(refd)***

Josephson v. Walker (1914) 18 CLR 691 ***(refd)***

Kerajaan Negeri Johor & Anor v. Adong Kuwau & Ors [1998] 2 CLJ 665 CA ***(refd)***

Manggai v. Government of Sarawak & Anor [1970] 1 LNS 80 FC ***(refd)***

Superintendent of Land & Surveys Miri Division & Anor v. Madeli Salleh [2007] 6 CLJ 509 FC ***(refd)***

Superintendent of Lands and Surveys, Samarahan Division & Anor v. Abas Naun & Ors And Another Appeal [2015] 1 CLJ 18 FC ***(refd)***

Tio Chee Hing v. United Overseas Bank (Malaysia) Bhd [2013] 2 CLJ 910 FC ***(refd)***

Legislation referred to:

Federal Constitution, arts. 5, 8, 13

Land Ordinance (Sabah) (Cap 68), ss. 4, 13, 14, 15, 16

Rules of Court 2012, O. 15 r. 16

Specific Relief Act 1950, s. 41

Other source(s) referred to:

PW Young QC's Declaratory Orders, Butterworths, 2nd edn, p. 41

(Civil Appeal No: S-01(W)-49-02-2015)

For the 1st, 2nd, 3rd & 4th appellants - Mohd Ikhwan Ramlan; State Attorney General's Chambers, Sabah

For the respondents - Kong Hong Ming; M/s Lee & Kong

(Civil Appeal No: S-02(W)-255-02-2015)

For the appellant - Edwin Tsen & Chan Wai Ling; M/s WL Chan & Assocs

For the respondents - Kong Hong Ming; M/s Lee & Kong

[Editor's note: For the High Court judgment, please see Sudi Kembang Sdn Bhd v. Alfeus Yahsu & Anor; Assistant Collector Of Land Revenues, Beluran & Ors [2014] 1 LNS 606 (overruled).]

Reported by Sandra Gabriel

JUDGMENT

Prasad Sandosham Abraham JCA:

[1] We heard both these appeals together in the sitting of the court at Kota Kinabalu on 27 January 2016. Having heard the submissions of the respective counsels, we reserved judgment in respect of both appeals. We now deliver our decision and grounds of judgment.

[2] This appeal raises several interesting points of law and fact over the plaintiffs' claim to the disputed land, the subject matter of this dispute based on common law and customary rights.

Background Facts

[3] We will refer to the respective parties as cited in the original suit. The facts are elucidated from the pleadings, judgment of the learned judge and the submissions of the respective parties.

[4] The land in dispute is part of a piece of land measuring about 15 acres (the disputed land) situated at Kampung Ansuan of Telupid in the Beluran District which has been included in the Country Lease No. 85334130 measuring 500 acres alienated to the plaintiff with effect from 12 October 2001 in which the plaintiff is the registered owner of the disputed land. The disputed area is marked as L1 in exh. D3 (see p. 2 of the appellants' core bundle).

[5] The plaintiff commenced an action against the first and second defendants in this present suit for an injunction to stop the defendants from trespassing onto the disputed land and for a mandatory injunction to remove the body of late Yahsu Linggis, the defendants' late father who was buried in the disputed land.

[6] The plaintiff had earlier commenced an action against the late father of the defendants for trespass under Suit No. S22-13-2006 wherein judgment was granted to the plaintiff on 26 September 2008 after their late father's defence was struck out.

[7] The defendants had filed their defence as well as a third party proceeding against the Assistant Collector of Revenue District of Beluran and three others. Their main defence is that the defendants' case is under common law as their forefathers had acquired native customary rights to the disputed land even before the arrival of British Chartered Company in North Borneo and before the enactment of any written law on land ownership and alienation of such land as the Land Ordinance 1930 for generations.

[8] The defendants claimed that their forefathers had lawfully occupied the land and thus the disputed land cannot be considered as State land defined under s. 4 of the Sabah Land Ordinance.

[9] The defendants seek in their counterclaim for declarations against the third parties on the grounds, *inter alia*, that:

(a) The impugned alienation of the Country Lease 085334130 was contrary to the procedure of the Land Ordinance for non-compliance of s. 13 of the Land Ordinance and was invalid on the ground that the mandatory notice of the plaintiff's land application to natives claiming native customary rights pursuant to s. 13 was not issued or published by the first third party (ACLR). The defendants also contended that if the said notice was issued, the said notice was wrong in law and procedure and was inadequate. Consequently, the impugned alienation of the Country Lease 085334130 by the third party (Director) was null and void.

(b) The impugned alienation by the first and third party was unconstitutional as being in violation of arts. 5, 8 and 13 of the Federal Constitution to the native customary rights of the defendants as natives, and hence, null and void.

(c) In alienating the Country Lease 085334130 including the said land to the plaintiff, the first and third party had acted in breach of fiduciary duty to the defendants as natives.

[10] The learned High Court Judge ruled against the plaintiff on all issues including non-compliance of a step in the procedure of land alienation according to the Sabah Land Ordinance. The learned judge went on to declare that the defendants are entitled for the declarations that they sought. Hence this appeal.

Issues Pertaining To The Customary Rights Of The Defendants To The Disputed Land And In Common Law

[11] In this instant appeal, the defendants *vide* their counterclaim were pursuing a declaratory relief from the High Court to recognise their existing native customary rights. Generally our courts in several major pronouncements on this aspect of the law have recognised native customary rights as creating proprietary interest over land where that interest is claimed, and these proprietary rights have been elevated to receive the protection of the Federal Constitution with regards to rights to property (see art. 13 of the Federal Constitution). In this regard we refer to the decision of the Federal Court, in *Superintendent of Land & Surveys Miri Division & Anor v. Madeli Salleh* [2007] 6 CLJ 509 and to the judgment of His Lordship Arifin Zakaria FCJ and we quote:

> (1) The proposition of law as enunciated in the two cases of *Adong Kuwau* (*supra*) and *Nor Anak Nyawai* (*supra*) reflected the common law position with regard to native titles throughout the Commonwealth. And it was held by Brennan J, Mason CJ and McHugh J, concurring, in the Australian case of *Mabo (No. 2)* that by the common law, the Crown may acquire a radical title or ultimate title to the land but the Crown did not

thereby acquire beneficial ownership of the land. The Crown's right or interest is subject to any native rights over such land. They adopted the view of the Privy Council in *Amodu Tijani v. Secretary, Southern Nigeria*, where the Privy Council in an appeal from the Supreme Court of Nigeria held that radical title to land held by the White Cap Chiefs of Lagos is in the Crown, but a full usufructuary title vests in a chief on behalf of the community of which he is head. That usufructuary title was not affected by the cession to the British Crown in 1861; the system of Crown grants must be regarded as having been introduced mainly, if not exclusively, for conveyancing purposes. Although the instant case dealt with individual rights and not communal rights, the principle applicable was the same. *Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor* (*foll*); *Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors* (*foll*); *Mabo (No. 2)* (*foll*); *Amodu Tijani v. Secretary, Southern Nigeria* (*foll*). (paras 22 & 23)

(2) Native holdings are not only recognised by the 1920 Regulations, but where possible, such holdings may even be registered. Registration, however, is not a necessary prerequisite for such holdings to be recognised. In the light of this, it was erroneous to hold, as was held by the learned Judicial Commissioner in the present case, that native customary rights in Sarawak were only created by s. 66 of the Ordinance. What s. 66 purported to do was to stipulate new conditions before native customary rights could be recognised after the coming into force of the Ordinance. It does not purport to nullify native customary rights that had been acquired or recognised prior to the coming into force of the Ordinance. In other words, it has no retrospective force. The respondent's claim in this case arose from circumstances which occurred prior to the Ordinance, since his father and his forefather had been in occupation of the said land prior to 1922. It was not in dispute that the respondent was born on the said land in 1922. Even though the respondent admitted that he left the said land before the house on the said land was gutted by fire in 1941, he maintained that he returned to the said land regularly to attend to the fruit trees. He claimed he did so on a monthly basis. The respondent's testimony in this regard went unchallenged. This was further fortified by the evidence of an employee of the Jabatan Kerja Raya who visited the said land as late as 1975 and confirmed that there were fruit trees and rubber trees on the said land. A letter dated 26 March 1982 addressed to the 1st appellant from the Head of the Malay Community in Miri in support of the respondent's application for title to the said land confirmed that the respondent's father was in occupation of the said land before it came under the Shell Concession Area. (para 28)

[12] We also refer to the case of *Kerajaan Negeri Johor & Anor v. Adong Kuwau & Ors* [1998] 2 CLJ 665; [1998] 2 MLJ 158 a decision of the Court of Appeal where it was held:

(1) the court entirely agreed with the views expressed by the judge upon the issue of liability. Those views accorded with the jurisprudence established by our courts and by the decisions of the courts of other jurisdictions which deserve much respect. It is now settled beyond

argument in our jurisdiction that deprivation of livelihood may amount to deprivation of life itself and that state action which produces such a consequence may be impugned on well-established grounds. The judge was therefore correct in concluding that where state action has the effect of unfairly depriving a citizen of his livelihood, adequate compensation is one method of remedying the harm occasioned by such action pursuant to art 13 of the Federal Constitution.

And we quote from the judgment of His Lordship Gopal Sri Ram JCA (as he then was) in delivering the leading judgment of the court.

The Act makes it plain that it does not exclude the rights vested in the respondents at common law. The appellants' argument was fallacious because ss. 5 and 6 of the Act which were relied upon by the appellants are concerned with an aboriginal area. However, the respondents' case was not based upon a claim that the land in question was an aboriginal area. They relied upon the absence of anything in the Act that excludes their common law rights to derive their livelihood from land which is an 'aboriginal inhabited place' (see p. 164D-I). The first of these passages appears at p 50 of the appeal record and reads ([1997] 1 MLJ 418 at p. 430):

> My view is that, and I get support from the decision of *Calder*'s case [*Calder v. A-G of British Columbia* (1973) 34 DLR (3d) 145] and *Mabo*'s case [*Mabo & Ors v. State of Queensland & Anor* (1986) 64 ALR 1], the aboriginal peoples' rights over the land include the right to move freely about their land, without any form of disturbance or interference and also to live from the produce of the land itself, but not to the land itself in the modern sense that the aborigines can convey, lease out, rent out the land or any produce therein since they have been in continuous and unbroken occupation and/or enjoyment of the rights of the land from time immemorial. I believe this is a common law right which the natives have and which the Canadian and Australian courts have described as native titles and particularly the judgment of Judson J in *Calder*'s case at p 156 where his Lordship said the rights and which rights include '... the right to live on their land as their forefathers had lived and that right has not been lawfully extinguished ...'. I would agree with this *ratio* and rule that in Malaysia the aborigines' common law rights include, *inter alia*, the right to live on their land as their forefathers had lived and this would mean that even the future generations of the aboriginal people would be entitled to this right of their forefathers.

The next passage is at pp. 52-53 of the appeal record ([1997] 1 MLJ 418 at pp. 430-431). In it the judge said:

> These people live from the hunting of animals in the jungle and the collection of jungle produce. Those are the only source of their livelihood and income. Can these rights be taken away by the government without compensation? At a glance this could be

done, but upon looking further and deeper, it is my opinion that compensation ought to be made. This can be discerned from s. 11 of the Act, guarantees adequate compensation for land, bearing rubber or fruit trees claimed by the aboriginal people, that is alienated. It is clear to me that the land on which those trees are planted is either a reserve land for the aboriginal people or an area where they had a right to access, which is a jungle reserve. In the first case, there is no problem because it is their reserved land. In the second case, it is clear that the land belongs to the state but they were planted by the aborigines. As such, adequate compensation must be made for these trees but not for the land. In the present case, I am of the view that adequate compensation for the loss of livelihood and hunting ground ought to be made when the land where the plaintiffs normally went to look for food and produce was acquired by the government. The compensation is not for the land but for what is above the land over which the plaintiffs have a right.

The Act does not limit the aborigines' rights therein. In order to determine the extent of aboriginal peoples' full rights under law, their rights under common law and statute has to be looked at conjunctively, for both these rights are complementary, and the Act does not extinguish the rights enjoyed by the aboriginal people under common law. (emphasis added)

[13] The courts have recognised the rights of natives to move freely within the ambits of their land, without any form of hindrance or restrictions and also to live from the produce from the land itself. But not to the land itself, in the modern sense the natives can convey lease-out, rent-out the land itself or any of its produce so long as there have been in continuous and uninterrupted occupation and/or enjoyment of the rights of the land from time immemorial. These rights of natives in Sabah categorised as native customary rights now receive statutory recognition and protection under the Sabah Land Ordinance. This protection merely reflects the common law rights on natives to their native customary lands and more fundamentally the courts have without reservation given due recognition to such rights as native customary rights are part and parcel of the way of life of the native population in Sabah where occupation of land and living off the land is a centrifugal part of the natives' way of life.

[14] The High Court moved to exercise its powers in granting declaratory relief that it did pursuant to O. 15 r. 16 of the Rules of Court 2012 read together with s. 41 of the Specific Relief Act 1950. The first issue to be considered would be was the learned judge right in law in assuming original jurisdiction over the matter when the relevant statutes clearly provides the High Court's jurisdiction is merely of an appellate nature. In considering this question our attention is drawn to the relevant portions of the Sabah Land Ordinance (cap 68) which are now set out:

A

12. Applications for state land.

Applications for State land may be made to the Director, or to the Collector, and shall be substantially in the form of Schedule 111.

13. Enquiry as to native rights

B

Upon the receipt of any application for unalienated country land it shall be the duty of the Collector to publish a notice calling upon any claimant to native customary rights in such land who is not yet in possession of a registered documentary title to make or send in a statement of his claim within a date to be specified in the notice. If no claim is made the land shall be dealt with as if no such rights

C

existed.

14. Collector to decide claims

Claims to native customary rights shall be taken down in writing by the headman or by the Collector, and shall be decided by the Collector.

D

15. Definition of customary rights

Native customary rights shall be held to be

(a) land possessed by customary tenure;

E

(b) land planted with fruit trees, when the number of fruit trees amounts to twenty and upwards to each acre;

(c) isolated fruit trees, and sago, rotan or other plants of economic value, that the claimant can prove to the satisfaction of the Collector were planted or kept up and regularly enjoyed by him as his personal property;

F

(d) grazing land that the claimant agrees to keep stocked with a sufficient number of cattle or horses to keep down the undergrowth;

(e) land that has been cultivated or built on within three years;

G

(f) burial grounds or shrines;

(g) usual rights of way for men or animals from rivers, roads, or houses to any or all of the above.

16. Procedure when rights established

H

Native customary rights established under section 15 shall be dealt with either by money compensation or by a grant of the land to the claimant and in the latter case a title shall be issued under Part IV.

41. Appeal

(1) An appeal shall lie from any order or decision of a Collector,

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Settlement Officer, Surveyor or Registrar given under this Ordinance to the Director, and again from any order or decision of the Director, whether original or an appeal to the Court:

Provided that no appeal shall be admitted:

(a) after the expiration of thirty days or, where any of the parties are resident outside Sabah, ninety days, from the date of the order or decision appealed against;

(b) until the prescribed fees shall have been paid;

(c) if it is expressly provided that the order or decision shall be final or if any other form of appeal is prescribed;

(d) from any decision of the Director under section 9 of this Ordinance.

(2) Except as herein expressly.

[15] The position in law is where statute provides a specific regime of remedies that places the High Court with an appellate jurisdiction then in those circumstances the High Court cannot be seised with jurisdiction to hear this matter as it did. We refer to the unreported Federal Court decision of *Manggai v. Government of Sarawak & Anor* [1970] 1 LNS 80 where His Lordship Gill FJ as he then was said and we quote:

> It is well settled law that the Court will not make a declaratory judgment where an adequate alternative remedy is available (see *Halsbury's Laws of England*, 3rd edn. vol 22, page 749, para 1611). To quote but a few authorities in support of that proposition, Lord Herschell said in *Barraclough v. Brown*: [1897] AC 615, 620.
>
> It was argued for the appellant that, even if not entitled to recover the expenses by action in the High Court, he was, at all events, entitled to come to that Court for declaration that on the true interpretation of the statute he had a right to recover them. It might be enough to say that no such case was made by the appellant's claim. But, apart from this, I think it would be very mischievous to hold that when a party is compelled by statute to resort to an inferior Court he can come first to the High Court to have his right to recover the very matter relegated to the inferior court-determined. Such a proposition was not supported by authority, and is, I think, unsound in principle.

We observed that the learned judge in his grounds of judgment had not considered this decision of the Federal Court. We also refer to text book entitled *PW Young QC's Declaratory Orders*, 2nd edn, Butterworths at p. 41 and we quote:

> [502] A strong line of authority exists to support the view that where legislation invents a right and mentions a mode of enforcing that right, that the mode mentioned is the exclusive mode of enforcement. This principle was laid down by the High Court of Australia in *Josephson v. Walker* (1918) 18 CLR 691 and has been affirmed many times since.

[16] We refer also to the case of *Josephson v. Walker* (1914) 18 CLR 691 a decision of the High Court of Australia at p. 693 and we quote:

A Where a Statute imposes a new obligation and also specifies a mode of enforcing it, that mode is the only one that can be adopted: *Cobar Corporation Ltd. v. Attorney-General for New South Wales* (3); *Pasmore v. Oswaldtwistle Urban Council* (4); *Devonport Corporation v. Tozer* (5); *Lnstitute of Patent Agents v. Lockwood* (6) ...

B We refer to the judgment of His Lordship Griffith at p. 695 and we quote:

The ground of the demurrer is substantially that an action will not lie in the Supreme Court, that the obligation sought to be enforced is an obligation created by Statute, and that the general rule is that where a Statute creates a new obligation and provides a special mode of enforcing it, no other Court has jurisdiction to enforce that obligation. The case C generally referred to to establish that rule is *Pasmore v. Oswaldtwistle Urban Council* (3). I quote from the speech of the *Earl of Halsbury* L.C.:—" The principle that where a specific remedy is given by a Statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the Statute, is one which is very familiar and D which runs through the law. I think Lord *Tenterden* accurately states that principle in the case of *Doe v. Bridges* (4). He says:

> where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner.

E **[17]** The learned judge in his grounds of judgment (see pp. 14-17 of supplementary record of appeal) seeks to distinguish several cases including those decisions of Federal Court on this point and rely on his own decision of *Borneo Samudera Sdn Bhd v. Uttoh Ajak & Ors; The Assistant Collector Of Land Revenue, Kinabatangan & Ors (Third Parties)* [2014] 1 LNS 635 to hold that F for any claims relating to native customary rights occurring before 1930, the natives would be entitled to pursue a claim in common law (see p. 16 of supplementary record of appeal). However we are of the view that in this particular case, the court is concerned not with the question of when these rights materialised but the manner these rights are to be recognised in law. G The Sabah Land Ordinance and its precursors do not make any distinctions between claims arising before 1930 or otherwise. The relevant statutes just provide a regime of procedures which a claimant must take to establish its customary rights, the apex of which lies with the High Court sitting as an appellate court. We therefore are unable to agree with the view of the learned judge in making a distinction between a cut-off date of claims before 1930 H and otherwise. These rights from whatever date they accrue must be dealt with by the existing Land Ordinance as the consequence of a successful claim for native customary rights would result in a native customary title being issued by the third party or pursuant to s. 16 of the Sabah Land Ordinance the claim to native customary rights could be dealt with monetarily.

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[18] We refer now to the decision of Federal Court in *Tio Chee Hing v. United Overseas Bank (Malaysia) Bhd* [2013] 2 CLJ 910 and in particular the judgment of His Lordship Suriyadi Halim Omar at para. 33 and we quote:

> [33] To fortify our view, s. 41 of the Sabah Land Ordinance (Cap 68) clearly legislates that (similar the Income Tax Act) an appeal shall lie from any order or decision of the director, whether original or an appeal, to the court.
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> Section 4 of this Ordinance provides that "court" means the "High Court". It is succinctly legislated in s. 41 that no court shall exercise jurisdiction as to any claim or question in respect of which jurisdiction is given by the Sabah Land Ordinance (Cap 68) to the director. Certainly it bars the High Court from exercising an original jurisdiction thus leaving it only an appellate jurisdiction (*Darinsok Pangiran Apan & Ors v. Hap Seng Consolidated Bhd & Ors* [2011] 6 CLJ 733; *Burhan Ating & Ors v. Directors of Lands & Surveys & Ors* [1992] 2 CLJ 1203; [1992] 2 CLJ (Rep) 211; *Ismail Hj Yunus & 2 Ors (For Themselves and On Behalf of 300 Ors v. Syarikat Kerjasama Perkembangan Tanah Pagagau Berhad & Anor* [1994] 4 CLJ 701). This strengthens our view that the issue of the two Memorials was not heard by the High Court in the exercise of its original jurisdiction but rather in the course of an appeal,

which to our mind is a strong authority for the proposition that the defendants in this case should have relied on the relevant provisions of the Sabah Land Ordinance. The learned judge appears to have distinguished this decision of Federal Court on the basis of manner in which the pleadings have been formulated. In our view the pronouncement of the Federal Court is clear in terms as to the proposition in law that is propounded and we feel that it is opportune to remind the High Court and other subordinate courts of the principles of "*stare decisis*" which is an essential component of our jurisprudence. Having accepted the decision of Federal Court (*supra*) reflects the legal position in Sabah the learned judge should then have followed the *ratio* of the Federal Court's decision which we regret the learned judge did not do it in this instant case (see p. 26 supplementary record of appeal). We refer to the decision of Federal Court in *Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal* [2006] 1 CLJ 577; [2006] 2 MLJ 293 and to His Lordship Steve Shim (CJSS) at pp. 583 & 584 (CLJ); p. 297 (MLJ) and we quote:

> [2] *It is axiomatic to state that the doctrine of stare decisis has become the cornerstone of the common law system practised in this country. It is fundamental to its existence and to the rule of law. It has attained the status of immutability*. In *Public Prosecutor v. Datuk Tan Cheng Swee & Anor* [1980] 2 MLJ 276, Chang Min Tat FJ had occasion to restate the doctrine in words which are poignantly clear when he said (at p 277):
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> > It is ... necessary to reaffirm the doctrine of *stare decisis* which the Federal Court accepts unreservedly and which it expects the High Court and other inferior courts in a common law system such as ours to follow similarly.

A [3] Judicial hierarchy must be observed in the interests of finality and certainty in the law and for orderly development of legal rules as well as for the courts and lawyers to regulate their affairs. Failure to observe judicial precedents would create chaos and misapprehensions in the judicial system. This fact was certainly borne in mind by the Court of Appeal in *Periasamy s/o Sinnappan & Anor v. Public Prosecutor* [1996] 2 MLJ
B 557 wherein Gopal Sri Ram JCA said (at p 582):

> We may add that it does not augur well for judicial discipline when a High Court judge treats the decision of the Supreme Court with little or no respect in disobedience to the well-entrenched doctrine of *stare decisis*. *We trust that the occasion will never arise again when we*
C *have to remind High Court judges that they are bound by all judgments of this court and of the Federal Court and they must, despite any misgivings a judge may entertain as to the correctness of a particular judgment of either court, apply the law as stated therein.*

> [4] The observation is but a stark reminder to judges of the importance
D of adhering to the doctrine. That observation, although made in the context of a peculiar factual setting, is, in my view, equally applicable to the particular situation in the instant case where the Court of Appeal has refused, for insufficient reasons, to follow and apply the 'real danger of bias' test for recusal enunciated by the Federal Court in *Majlis Perbandaran Pulau Pinang* and *Mohamed Ezam*. Until such time when the Federal Court
E holds otherwise, this test must remain entrenched and binding on all inferior courts including the Court of Appeal. Certainty in the law must prevail. (emphasis added)

We also quote the decision of Abdul Hamid Mohamd FCJ in the same decision:

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> [20] *These judgments, being judgments of the Federal Court, are binding on the Court of Appeal. Whether the Court of Appeal agrees with them or not, it is incumbent upon it to apply the test. However, if the court thinks that it has good reasons for disagreeing with the judgments, it may, while following them, point out why they should be reviewed by this court. But the review, if it were to be done, should be done by this court. Until it is actually done by this court, they remain binding on the Court*
G *of Appeal*. So, the Court of Appeal was wrong in not applying the 'real danger of bias' test. (emphasis added)

[19] In our view, the learned judge should have followed the reasoning of Federal Court in *Tio Chee Hing*'s case adding that if the learned judge had any misgivings or reservations the learned judge could have called for review
H on the position taken by the Federal Court with regards to the avenues for native claims to be pursued.

[20] We therefore, conclude that the learned judge in granting the declaratory orders sought by the defendants acted without jurisdiction as the
I High Court was again seised with appellate powers only and under those circumstances the order granted by the High Court should be set aside.

[21] Despite the position taken by the learned judge in respect of the original jurisdiction of the High Court to grant declaratory relief, the learned judge proceeded to deal with s. 13 notice under Sabah Land Ordinance and declared it to be invalid. To our mind, if a position is taken that the High Court has original jurisdiction to declare native customary rights, the issue of whether s. 13 notice was valid or not would be irrelevant. However, we prefer the reasoning and views expressed by His Lordship Rahman Sebli J (as he then was) in the case of *Ensui Gudul v. Suin & Ors* [2010] 1 LNS 943 and we quote:

> [15] Learned counsel for the defendants contended that s. 13 of the Land Ordinance had not been complied with in that no evidence was adduced to prove personal service of the s. 13 notice on the defendants. It therefore follows according to learned counsel, that the defendants' right over the said land has not been legally extinguished by the issuance of the title deed to the plaintiff's late mother.
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> [16] *In my view there is no requirement for personal service of the s 13 notice. To construe otherwise would be to read something into s 13 which is not there. The purpose of the notice is to notify the general public (as opposed to any individual person) that an application for alienation has been made and that if any person has any customary rights claim in the land he is to make or send in his statement of claim within the specified period*. (emphasis added)

We therefore find that the said notice is valid.

[22] It must be pointed that this judgment in no way derogates the rights of natives to pursue a claim for native customary rights. What is being pronounced is that any claimant like the defendants must pursue their claim in accordance with the relevant provisions of the Sabah Land Ordinance and it is immaterial when that cause of action accrues ie before 1930 or otherwise for the purposes of the procedure to be used, in establishing a claim for native customary rights. A review of several provisions of the Sabah Land Ordinance clearly points to that position in law.

[23] The consequence of allowing this appeal in directing the claim of the defendants to be dealt with by the Sabah Land Ordinance will render the defendants without remedy. In view of our finding that the s. 13 notice was valid and pursuant to s. 13 of the Sabah Land Ordinance the defendants would be precluded from proceeding with their claim in the Land Office. Looking at the s. 13 notice (Tab G, Part C, vol. 1 of appeal record) there appears to be a time limit of one month set by the notice. It follows that even if we direct the defendants to initiate their claim in accordance with the provisions of the Sabah Land Ordinance, there may be a real possibility that the defendants will be out of time. In this regard we are guided by the *dictum* of His Lordship Suriyadi FCJ in the Federal Court decision of *Superintendent of Lands and Surveys, Samarahan Division & Anor v. Abas Naun & Ors And Another Appeal* [2015] 1 CLJ 18 at para. 35 of the judgment:

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[35] As illustrated above, in light of their want of sophistication let alone the respondents live deep in the hinterland, to expect the respondents to file judicial review applications within the legislated statutory time limit after the appellants' public acts and adhere to protocol finesse as fashioned out in O. 53 may lead to real injustice to them. Such strict expectation from the natives would result in "irreparable injustice" to them (*Nikodemus Singai & Ors v. Sibu Slipway Sdn Bhd & Ors* [2010] 10 CLJ 383). Clearly the mode of O. 53 is unsuitable for cases of this genus. It must be borne in mind that the NCR's value cannot stand on its own but intertwined with the NCR land. It is from this NCR land, which comprise farmland and forest that the respondents will derive food, valuable medicines, wildlife and other forest produce for their livelihood and sustenance. They will farm, cultivate and plant paddy, fruit trees, rubber trees, cocoa and other essential trees and crops on it. The NCR land is fundamental to their social, cultural and spiritual survival as natives of Sarawak. In other words the NCR land not only is a source of livelihood but constitute life itself. To allow with a stroke of a pen a singular government servant to oust and uproot a whole community, and without any real chance of voicing their grievances when extinguishing their NCR, was surely not what Parliament had in mind.

[24] Bearing in mind and being guided by this *dictum* of His Lordship and taking also into account the orders made by the Court of Appeal in case of *Darinsok Pangiran Apan & Ors v. Hap Seng Consolidated Bhd & Ors* [2011] 6 CLJ 733, and taking into account the issues in this case are mainly questions of statutory interpretation and native customary rights, on the upshot, we would allow this appeal and make the following orders:

(i) the order of the High Court dated 8 January 2015 is set aside;

(ii) the first third party (ACLR) be ordered to conduct a public inquiry within 60 days from the date of this order, relating to the defendants' NCR claims pursuant to ss. 13, 14, 15 and 16 of the Sabah Land Ordinance;

(iii) parties are at liberty to apply; and

(iv) no order as to costs and the deposit to be refunded to the appellants in both suits.